(1)

Supreme Court, U.S.
FILED
FEB 6 1992
OFFICE OF THE CLERK

91-1289

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF OHIO
Petitioner

-vs-

DAVID S. MILLER
Respondent

PETITION FOR A WRIT OF CERTIORARI
To The Ninth District Court of Appeals
For Summit County Ohio

LYNN C. SLABY
Prosecuting Attorney
PHILIP D. BOGDANOFF, Attorney of Record
Assistant Prosecuting Attorney
53 University Avenue
Akron, Ohio 44308
(216) 379-2791
Counsel for Petitioner

MARTA J. WILLIGER
Attorney at Law
2095 East Ave.
Akron, Ohio 44314
(216) 745-8816
Counsel for Respondent

QUESTIONS PRESENTED

I. DOES A TERRY FRISK FOR WEAPONS OF AN ARRESTED PERSON'S COMPANION CONSTITUTE AN UNREASONABLE SEARCH UNDER THE FOURTH AMENDMENT?

II. MUST THE POLICE HAVE A REASONABLE SUSPICION TO BELIEVE THAT THE COMPANION OF AN ARRESTED PERSON IS ARMED BEFORE THEY CAN CONDUCT A TERRY FRISK OF THAT PERSON?

III. WHEN CONDUCTING A TERRY SEARCH FOR WEAPONS, CAN THE POLICE HAVE A PERSON LIE DOWN ON THE GROUND AND THEN ROLL OVER WITHOUT VIOLATING THE PERSON'S FOURTH AMENDMENT RIGHTS?

TABLE OF CONTENTS

	PAGE(S)
Questions Presented----------	i
Table of Authorities----------	iv
Opinions Below----------	vii
Constitutional Provisions and Statutes Involved----------	viii
Amendement IV----------	viii
Statutes Involved----------	viii
Jurisdictional Statement-------	1
Statement of the Case----------	2
Statement of the Facts---------	4
First Reason for Granting the Writ	
This Court should resolve the conflict among various federal circuit courts as to whether a police officer may conduct a weapons search of an arrested person's companion without reasonable suspicion to believe that the companion is armed.----------	7

TABLE OF CONTENTS
(Cont'd)

PAGE(S)

Second Reason for Granting the Writ

This court should determine the scope of a Terry weapons search and determine if the police can have a person lie down and roll over as part of this search.---------- 22

Conclusion---------- 29

Appendix---------- 30

Opinion of the Supreme Court of Ohio (12-11-91)---------- 31

Decision and Journal Entry of Ninth District Court of Appeals (7/31/91)-------- 32-52

Journal Entry, Court of Common Pleas (1-2-91)------- 53-55

Ohio Revised Code 2925.11--- 56-57

Ohio Revised Code 2923.24--- 58

TABLE OF AUTHORITIES

CASES CITED	PAGE(S)
Chimel v. California, 395 U.S. 752 (1969)---------	13
Delaware v. Prouse, 440 U.S. 648, 654 (1974)----	16
Dunaway v. New York, 442 U.S. 200 (1979)---------	22
Florida v. Royer, 460 U.S. 491 (1983)---------	24
Maryland v. Buie, 110 S.Ct. 1093 ___ U.S. ___ (1990)---------	15
New York v. Class, 475 U.S. 106, 117 (1985)----	18
Penn v. Mimms, 434 U.S. 106, 110 (1977)----	17
Terry v. Ohio, 392 U.S. 1 (1986) ----------7,8,9,10,11,12,15,17, ----------18,19,22,23,24,28	
United States v. Bell, 762 F.2d 495 (6th Cir. 1985) cert. denied 474 U.S. 853 (1985)----------	8,11
United States v. Berryhill, 445 F.2d 1189, 1193 (4th Cir. 1971)----------8,10,11	

TABLE OF AUTHORITIES
(Cont'd)

	PAGE(S)
United States v. Del Toro, 464 F.2d 520 (2nd Cir. 1972)----------	10
United States v. Fleet, 806 F.2d 823 (8th Cir. 1986)----------	8
United States v. Martinez v. Fuerte, 428 U.S. 543, 560-561(1976)-	16
United States v. Poms, 484 F.2d 919 (4th Cir. 1973)----------	10
United States v. Sharpe, 470 U.S. 675 (1985)---------	24
United States v. Sink, 586 F.2d 1041 (5th Cir. 1978) cert. denied 443 U.S. 912 (1979)----------	8
United States v. Thorpe, 536 F.2d 1098, 1101 (5th Cir. 1976)----------	8
Ybarro v. Illinois, 444 U.S. 85 (1979)--------12,13,15	
STATUTES	
O.R.C. §2923.24----------	2
O.R.C. §2925.11----------	2

TABLE OF AUTHORITIES
(Cont'd)

PAGE(S)

CONSTITUTION

Constitution of the United States

Amendment IV
----------1,3,15,16,,17,19,21,24,28

OTHER AUTHORITIES

2 William E. Ringer,
Search and Seizures,
Arrests and Confessions,
§12.6(b)(1991)---------- 12

United States Department of Justice,
Uniform Criminal Reports,
Law Enforcement Officers
Killed in the Line of Duty,
at 3, 41 (1990)----------17-18,28

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF OHIO
Petitioner

-vs-

DAVID S. MILLER
Respondent

PETITION FOR A WRIT OF CERTIORARI
To The Supreme Court of Ohio

OPINIONS BELOW

The decision of the Supreme Court of the State of Ohio denying jurisdiction is reproduced in the Appendix of the Petition at page 31.

The decision of the Court of Appeals for the Ninth District affirming the judgment of the trial court of Summit County is reproduced in the Appendix of the Petition at pages 32-52.

The decision of the Summit County Court of Common Pleas suppressing the evidence is reproduced in the Appendix at pages 53-55.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions Involved

U.S. Const., Amend. IV

The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

STATUTES INVOLVED

O.R.C. 2925.11 [Drug Abuse.] Reproduced in part at pages 56-57.

C.R.C. 2923.24 [Possession of Criminal Tools.] Reproduced at page 58.

JURISDICTIONAL STATEMENT

Petitioner respectfully requests this court to invoke jurisdiction under 18 U.S.C. 1257(3). The court of Common Pleas for Summit County on January 2, 1991, refused to suppress the evidence in this case finding that it was legally seized under the Fourth Amendment. The decision was reversed by the Court of Appeals for the Ninth Judicial District of Ohio on July 31, 1991. The Appellate Court found that the police violated the Defendant's Fourth Amendment rights in this case and reversed Defendant's conviction. The Supreme Court of Ohio refused to take jurisdiction of this case on December 11, 1991. Petitioner prays that this court grant the Petition For a Writ of Certiorari for the reasons that a state court in the instant case has incorrectly decided important federal questions that must be settled by this court.

STATEMENT OF THE CASE

On November 15, 1990, the Defendant was indicted by the Summit County Grand Jury on one count of Drug Abuse in violation of O.R.C. §2925.11 and one count of Possession of Criminal Tools in violation of O.R.C. §2923.24.

The Defendant filed a motion to suppress evidence found during a police search of the Defendant. After the trial court overruled Defendant's motion, the Defendant entered a plea of no contest to the charge of Drug Abuse and the charge of Possession of Criminal Tools was dismissed. The court found the Defendant guilty of Drug Abuse. The Defendant was sentenced to serve six (6) months at the Ohio Department of Rehabilitation and Correction and further ordered to pay the costs of the prosecution.

Defendant appealed his conviction to the Ninth District Court of Appeals on the issue of whether the evidence seized from him was illegally obtained. On July 31, 1991, the Ninth District Court of Appeals reversed Defendant's conviction finding that the police violated Defendant's Fourth Amendment rights when searching the Defendant. The State filed a timely Notice of Appeal to the Ohio Supreme Court. On December 12, 1991 the Ohio Supreme Court denied jurisdiction in this case. The State now seeks a Petition For a Writ of Certiorari from this court.

STATEMENT OF THE FACTS

On October 6, 1990, Detective Miksch of the Akron Police Department, along with the Narcotics Officers and uniform S.W.A.T. Team members were in the area of Wildwood Ave. in Akron investigating complaints of drug sales in the area. Detective Miksch's role as a backup officer was to effect the arrests of any suspects. Also in the area were undercover officers who were looking for people that were suspected of selling drugs and the officers would attempt to make buys from these suspects. The undercover officers would point out the drug sellers to Detective Miksch. Detective Miksch and the uniform officers would then make the arrest. The purpose of this procedure was to allow the police to make numerous drug arrests without the drug traffickers being aware of the police presence.

On the date in question, Detective Miksch was notified that a Mr. Leo Simmons was to be arrested for a charge of Aggravated Trafficking. Detective Miksch saw Simmons on the corner of Wildwood and Bye. The corner of Wildwood and Bye is a known drug area in the City of Akron. When Detective Miksch saw Mr. Simmons, he was standing near that corner talking to the Defendant, David Miller. Detective Miksch and uniform officers approached Mr. Simmons and Mr. Miller and ordered them to the ground. Detective Miksch's intention at the time was to arrest Mr. Simmons and to pat down the Defendant and Mr. Simmons for weapons to protect the officers' safety.

After patting the back of Mr. Miller for weapons, Detective Miksch asked Mr. Miller to roll over so that Detective Miksch could pat down the front of the

Defendant's body for weapons. When Mr. Miller rolled over, a two inch glass cylinder known as a straight shooter or crack pipe fell out of Mr. Miller's pocket. At that point Mr. Miller was placed under arrest and was subsequently charged with Drug Abuse and Possession of Criminal Tools.

FIRST REASON FOR GRANTING WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG VARIOUS FEDERAL CIRCUIT COURTS AS TO WHETHER A POLICE OFFICER MAY CONDUCT A WEAPONS SEARCH OF AN ARRESTED PERSON'S COMPANION WITHOUT REASONABLE SUSPICION TO BELIEVE THAT THE COMPANION IS ARMED.

The issue raised by the State is whether the police may stop and frisk for weapons the companion of an arrested person in order to protect the arresting officer's safety. Various federal circuit courts have analyzed this issue with various results and opinions.

In Terry v. Ohio, 392 U.S. 1 (1968) this court held that the police may stop a person when the police have reasonable suspicion to believe that the person is involved in criminal activity. Further, this court held that the police may conduct a limited frisk of this person for weapons in order to determine whether this individual was armed. Id.

at 27. This court's rationale supporting a limited weapons frisk for weapons was to protect a police officer from unnecessary safety risks in the performance of his duties. Id. at 23.

When considering whether the police can frisk the companion of an arrested person, numerous courts have cited Terry and held that the police must have a reasonable suspicion to believe the companion is armed in order to justify a Terry frisk. United States v. Bell, 762 F.2d 495 (6th Cir. 1985), cert. denied 474 U.S. 853 (1985), United States v. Sink, 586 F.2d 1041 (5th Cir. 1978), cert. denied 443 U.S. 912 (1979) United States v. Fleet, 806 F.2d 823 (8th Cir. 1986), United States v. Thorpe, 536 F.2d 1098, 1101 (5th Cir. 1976). However, in United States v. Berryhill, 445 F.2d 1189, 1193 (4th Cir. 1971) the court held that the police have an automatic

right to conduct a Terry frisk of an arrested person's companion in order to protect the arresting officer's safety:

* * *

> And the lawful arrest of Berryhill cannot legalize a personal search of a companion for evidence against her simply because she was there. United States v. Di Re, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210 (1948). The Supreme Court, however, has clarified the right of peace officers to protect themselves from the reasonably anticipated possibility of assault. In Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1967), the court affirmed the right of a limited search "to assure * * * that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him" despite the absence of probable cause for an arrest. We think that Terry recognizes and common sense dictates that the legality of such a limited intrusion into a citizen's personal privacy extends to a criminal's companions at the time of arrest. It is

> inconceivable that a peace officer effecting a lawful arrest of an occupant of a vehicle must expose himself to a shot in the back from defendant's associate because he cannot, on the spot, make the nice distinction between whether the other is a companion in crime or a social acquaintance. All companions of the arrested within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory "pat-down" reasonably necessary to give assurance that they are unarmed.

Several courts have followed the reasoning of Berryhill but have also indicated in dictum that the police in their case had a reasonable suspicion to believe the companion was armed before conducting a Terry frisk. See United States v. Del Toro, 464 F.2d 520 (2nd Cir. 1972), United States v. Poms, 484 F.2d 919 (4th Cir. 1973).

In United States v. Bell, supra, the court specifically rejected the reasoning of Berryhill finding that the "automatic companion role" was contrary to the decision in Terry that the police must have a reasonable suspicion to believe an individual was armed. A sourcebook on search and seizure law has noted the conflicts among the various circuit courts and indicated that this court has yet to squarely address this issue:

> Searches of Persons Other than the Arrestee: The "Automatic Companion" Rule. The Supreme Court has yet to squarely face the applicability of the Terry exception "pat-down" search to an arrestee's companion. (The Court has ruled, however, regarding overnight guests. See §12.6(b)(1), supra.) The circuit courts have done so, however, with differing results. When a suspect is arrested while in the company of other persons, there is a divergence of opinion regarding the

> treatment of the arrestee's companions. The basis for such searches seems to have been the Chimel rationale justifying the incident search.

2 William E. Ringer, Search and Seizures, Arrests and Confessions, §12.6(b) (1991).

In Ybarro v. Illinois, 444 U.S. 85 (1979) this court considered a closely related issue and refused to extend Terry to situations where the police did not have reasonable suspicion to believe the person was armed. In Ybarro, the police were executing a search warrant in a bar and searched the patrons of the bar. This court found that such a search was not authorized by Terry and specifically found that a frisk of the bar patrons for weapons was outside of the scope of a Terry frisk.

The State contends the holding of Ybarro does not control the instant

issue. The State is not arguing that the police should be able to search all persons in the general area where an arrest takes place. Instead, only those individuals who are reasonably believed to be companions of the arrested person are subject to a brief frisk for weapons. The Ybarro case is also distinguishable since in Ybarro, the police were not making an arrest but were executing a search warrant. In Chimel v. California, 395 U.S. 752 (1969) this court held that the police may search a Defendant and the area under his control when arresting a Defendant. One of the rationales behind such a search was the inherent dangers to the police when making an arrest:

> A similar analysis underlies the "search incident to arrest" principle, and marks its proper extent. When an arrest is made, it is reasonable for the

arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control" -construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

Id. at 762-763

Although this court will allow the police to search the Defendant and the area under Defendant's control for weapons in order to protect a police officer, an arrested person's companion is subject to no constraints. In Maryland v. Buie, 110 S.Ct. 1093 ___ U.S. ___ (1990) this court recognized the inherent danger to police officers when arresting a suspect and allowed the police to conduct a protective sweep in a suspect's home. The rationale behind the protective sweep was to protect police officers from a third party ambush. Id. at 1099.

Finally, the State notes that it is not asking this court to extend Terry. This court has always indicated that the Fourth Amendment only prohibits unreasonable searches and seizures. The issue before this court, which was not addressed in Ybarro, is whether the

frisk of an arrested person's companion is an unreasonable search and seizure under the Fourth Amendment. In determining whether this type of search is reasonable under the Fourth Amendment, this court has stated that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of a legitimate governmental interests." Delaware v. Prouse (footnotes omitted) 440 U.S. 648, 654 (1974). Although individualized suspicion is usually a prerequisite to a constitutional search or seizure, the Fourth Amendment imposes no irreducible requirement of such suspicion. United States v. Martinez v. Fuerte, 428 U.S. 543, 560-561 (1976).

As a general proposition of law, the State contends the governmental interest

in protecting a police officer's safety when making an arrest outweighs a companion's Fourth Amendment right to be free from unwarranted intrusions. First, this court has always recognized that the protection of a police officer in the performance of their duties is both a legitimate and weighty governmental interest. Penn v. Mimms, 434 U.S. 106, 110 (1977). Terry v. Ohio, supra. When the police arrest a suspect, they never know whether the suspect's companion is friend or foe. Although this country is engaged in a war on drugs, the police are the only participants of this war that are dressed in uniforms.

In 1990 there were 65 law enforcement officers killed in the line of duty and 71,794 assaults against police officers. United States Department of Justice, Uniform Criminal Reports, Law

Enforcement Officers Killed in the Line of Duty, at 3, 41 (1990). In 1990, twenty eight officers were slain during arrests situations, accounting for more line-of-duty deaths than any other circumstance. Id. at 3. Twenty-five percent of all assaults on police officers occurred while making arrests. Id. at 41. These statistics clearly indicate the inherent safety risks to police officers when making arrests.

Balancing the governmental interest against the intrusion into personal intrusion, this court has recognized that a Terry frisk is a substantial intrusion. New York v. Class, 475 U.S. 106, 117 (1985). However, a Terry frisk is brief in duration and a person is often released within seconds after the frisk is completed. The State contends the governmental interest in protecting a police officer's safety outweighs a

companion's right to be free from unwarranted governmental intrusions. Therefore, a search of an arrested person's companion does not violate the Fourth Amendment.

In the case at bar, the police did not violate the Defendant's Fourth Amendment rights when conducting a Terry frisk of the Defendant. The Akron Police had received complaints that the west side of Wildwood Avenue in Akron was being used as an open area where drugs could be bought and sold (T. p. 4-5). On October 6, 1990, the Akron Police had undercover officers making drug buys in this area. After an undercover detective had bought drugs, he would relay this information to another unit in the area which would make the arrest. The undercover detective was not involved in the arrest in order to keep his identity a secret and make more drug arrests.

Detective Miksch, an experienced narcotics detective, received a call on the police radio from the undercover detective that Mr. Simmons was to be arrested for Aggravated Trafficking in Drugs. Detective Miksch was in the cruiser and saw Mr. Simmons on the corner of Wildwood and Bye Streets talking to the Defendant. This corner is a known drug area. The two men were together and Detective Miksch and uniformed officers ordered both of them to the ground. Detective Miskch testified that his intention was to arrest Mr. Simmons and to pat down Mr. Simmons and the Defendant "for the officers' safety". Detective Miksch patted down the Defendant's back and then rolled him over to pat down the front of his body looking for weapons. When the Defendant rolled over on his stomach a crack pipe fell out of the

Defendant's pocket and was seized by the police.

The police did not violate the Defendant's Fourth Amendment rights when they searched the Defendant for weapons. The Defendant was a potential danger to the police and a brief weapons search of his body was a reasonable search under the Fourth Amendment. The Ohio Appellate Court committed error when it suppressed the crack pipe found by the police and vacated the Defendant's conviction. This court should grant a Petition For A Writ Of Certiorari in order to review this case and reverse the Appellate Court's decision.

SECOND REASON FOR GRANTING WRIT

II. THIS COURT SHOULD DETERMINE THE SCOPE OF A TERRY WEAPONS SEARCH AND DETERMINE IF THE POLICE CAN HAVE A PERSON LIE DOWN AND ROLL OVER AS PART OF THIS SEARCH.

The last issue presented before this court is whether the actions of Detective Miksch in having the Defendant lie down on the ground and roll over during the frisk of his person for weapons was an excessive search under Terry. The Ninth District Court of Appeals found that Detective Miksch used an improper weapons search citing Dunaway v. New York, 442 U.S. 200 (1979). In Dunaway, the Defendant was seized by the police and taken to the police station for interrogation. The court found that such a search was not permissible under Terry. Here, the police did not transport the Defendant to any location and Dunaway is clearly distinguishable from the instant case.

In Terry v. Ohio, supra, this court stated that the police were allowed to make a reasonable search for weapons in determining whether an individual was armed. However, this court held that what constituted a reasonable search for weapons would have to be decided on a case by case basis:

> We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases. See Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 1912, 20 L.Ed.2d 917 decided today. Suffice it to note that such a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime. See Preston v. United States, 376 U.S. 364, 367, 84 S.Ct. 1642, 1652, 18 L.Ed.2d 782 (1964). The sole justification of the search

> in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

Id. at 29.

The State contends a "lie down and roll over" weapons search is not an unreasonable weapons search under the Fourth Amendment. Although this court has not considered the scope of a weapon frisk, it has ruled on the scope of a Terry seizure. United States v. Sharpe, 470 U.S. 675 (1985), Florida v. Royer, 460 U.S. 491 (1983). In Sharpe this court stated:

> A creative judge engaged in post hoc evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But "[t]he fact that the protection of

> the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable." Cady v. Dombrowski, 413 U.S. 433, 447 (1973); see also United States v. Martinez-Fuerte, 428 U.S. 543, 557, n. 12 (1976). The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it.
>
> Id. at 687.

In the case at bar, Officer Miksch explained his weapons search:

* * *

ASST. PROSECUTOR CARROLL

Q. You, yourself, did you tell either Mr. Simmons or Mr. Miller to do anything as you approached them?

OFFICER MIKSCH

A. I told both people to get on the ground.

Q. Did they do that?

A. Yes, they did, immediately.

Q. Let's talk specifically about Mr. Miller. What position is he in on the ground?

A. Face down.

Q. What did you do, Detective Miksch?

A. I patted down Mr. Miller, then rolled him over and continued my pat down on the front of his body.

Q. What are you looking for in your pat down?

A. Weapons at that point.

Q. Your intention at that point is to pat him down and if no weapons are found, not to arrest him?

A. That's correct.

Q. The arrest is going to be of Mr. Simmons?

A. That's correct.

Q. So you have Mr. Miller secured there, he is on his stomach, you pat him down?

A. At first he was on his stomach and I began my pat down, that's correct.

Q. Did he at some point go over onto his back?

A. Yes, he did

Q. Tell the Judge what happened when he rolled over?

A. When he rolled over, a two inch -- approximately two-inch glass cylinder came out of his pocket. I immediately took control of that and it was obvious to me that it was what is known as a straight shooter, which is a pipe used by people to smoke cocaine.

(T. p. 8-9)

Officer Miksch testified he was in a drug area and used a lay down weapons search in order to better control a person. Officer Miksch also indicated this method of weapons search made it more difficult for individuals to run away from the police (T. p. 13). Officer Miksch stated he uses this method of searching for weapons in most situations depending on the circumstances (T. p. 13).

Although a "lie down and roll over" weapons search is more intrusive than a Terry frisk for weapons, the State contends this type of search is not unreasonable. As discussed earlier, there were 65 law enforcement officers killed and 71,794 line-of-duty assaults, against police officers in 1990. United States Department of Justice, Uniform Criminal Reports, Law Enforcement Officers Killed in the Line of Duty, at 3, 41 (1990). The scope of the weapons search was not unreasonable considering the circumstances of this case. The weapons search conducted by Officer Mitsch was not an unreasonable search under the Fourth Amendment.

CONCLUSION

The State has raised two issues of great constitutional importance. The State contends the companion of an arrested person is a likely threat to an arresting police officer and it is not unreasonable for the police to conduct a quick weapons search of this person. A weapons search is proper even if the police do not have any individualized suspicion to believe the companion is armed. Further, when performing a weapons search, police can have the person lie down on the ground and roll over in order to protect the officer's safety. The State requests this court to accept Certiorari of this case.

A P P E N D I X

THE SUPREME COURT OF OHIO
COLUMBUS

1991 TERM

To Wit: December 11, 1991

STATE OF OHIO :
Appellant, : Case No. 91-1900

v. : E N T R Y

DAVID S. MILLER :
Appellee :

Upon consideration of the motion for leave to appeal from the Court of Appeals for Summit County, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $40.00, paid by Lynn C. Slaby, Prosecuting Attorney.

THOMAS J. MOYER
Chief Justice

STATE OF OHIO	)	IN THE COURT OF
	)SS:	APPEALS
COUNTY OF SUMMIT	)	NINTH JUDICIAL DISTRICT
		C.A. NO. 14973
STATE OF OHIO	)	APPEAL FROM
	)	JUDGMENT ENTERED
Plaintiff-Appellant	)	IN THE COMMON
	)	PLEAS COURT
-vs-	)	COUNTY OF
	)	SUMMIT, OHIO
DAVID S. MILLER	)	CASE NO.,
	)	CR 90 10 1901
Defendant-Appellee	)	

DECISION AND JOURNAL ENTRY

Dated: July 31, 1991

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

Per Curiam. Defendant-appellant, David Samuel Miller, appeals a ruling of the Summit County Court of Common Pleas finding that a search of his person prior to his arrest satisfied the requirements of the Fourth Amendment to the United States Constitution.

Facts

The events leading to Miller's indictment for possessing criminal tools, R.C.2923.24, and drug abuse, R.C. 2925.11, are not disputed. During the evening of October 6, 1990, the Akron Police Department conducted a drug sweep in response to complaints from residents in the vicinity of Wildwood Ave. An undisclosed number of narcotics officers and SWAT team members participated in the endeavor. Detective Thomas Michael Miksch, who had sixteen years experience in narcotics investigations, received a radio dispatch instructing him to arrest Leo Simmons for aggravated trafficking in cocaine. In order to preserve the secrecy of the operation, the detective did not approach Simmons until he had left the area where undercover officers were attempting to make drug-buys. Detective Miksch later observed Simmons

at a street corner known for narcotics sales. Simmons was engaged in a conversation with Miller. No one else was present in the vicinity.

Accompanied by several officers, Detective Miksch confronted Simmons and Miller and ordered them to lie on the ground. He conducted a pat-down search of Miller and instructed him to roll over. A two-inch glass cylinder fell out of Miller's pocket as he complied. Recognizing the object as a tool for smoking cocaine, the detective seized it and placed Miller under arrest. The pipe was later found to contain cocaine residue.

Miller filed a pre-trial motion in the common pleas court seeking suppression of the pipe as the fruit of an illegal search. At an evidentiary hearing on the matter, Miksch testified that he had observed no suspicious

actions by Miller, and in response to a question concerning whether there was any indication that Miller might have had weapons on him, Miksch stated that he had no way of knowing until he patted him down.

Without making any factual findings as to there being either a reasonably articulable suspicion as to Miller's commission of a crime, or reasonable belief that he was armed, the trial court overruled the motion. Miller pleaded no contest to the charge of drug abuse and this appeal follows.

Assignment of Error

> "The defendant-appellant, David Samuel Miller, for his assignment of error, says that the decision rendered by the Court of Common Pleas, Summit County, Ohio, on January 2, 1991, is erroneous in overruling defendant's motion to suppress illegally obtained evidence."

There can be little doubt that when the officers approached Simmons and Miller and ordered them to lie on the ground, a "seizure" was effected for Fourth Amendment purposes. United States v. Mendenhall (1980), 446 U.S. 544, 552-555. Once Miller moved to suppress the evidence obtained, the prosecution bore the burden of establishing the constitutional propriety of the warrantless search. Xenia v. Wallace (1988), 37 Ohio St. 3d 216, paragraph two of the syllabus.

The trial court determined that probable cause existed to believe Miller was engaged in criminal activity as he stood on the street corner talking with Simmons. Under such circumstances an immediate, warrantless search of his person would be constitutionally justified as contemporaneous with a lawful arrest. United States v.

Robinson (1973), 414 U.S. 218, 235; State v. Moon (May 15, 1991), Lorain App. No. 90CA004882, unreported, at 4-5. Given that the facts presented are not in question, we review this legal conclusion de nova. See United States v. Maybusher (C.A. 9, 1984), 735 F. 2d 366, 371 fn. 1, certiorari denied (1985), 469 U.S. 110.

Probable cause to arrest and search an individual exists when the facts available to the officers at that moment warrant a person of reasonable caution in the belief that an offense has been committed. Beck v. Ohio (1964), 379 U.S. 89, 96. When the police initially encountered Miller, he was simply talking with Simmons in a high-crime neighborhood. Detective Miksch testified at the hearing that he did not know the subject matter of the conversation and no weapons, drugs, or suspicious actions were observed.

Miller's mere association with Simmons, albeit he was a drug-trafficking suspect, did not establish probable cause to arrest. As the United States Supreme Court stated in Sibron v. New York (1968), 392 U.S. 40, 62:

> "***The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security.***."

The Court further explained in Ybarra v. Illinois (1979), 444 U.S. 85, 91, that:

> "***Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another[.]"

See, also, State v. Fahy (1988), 49 Ohio App. 3d 160, 161-162.

In cases involving arrests in high-crime areas, courts employing the probable cause analysis generally require more concrete examples of furtive behavior than mere association with a criminal suspect. See, e.g., United States v. Davis (C.A.D.C. 1972), 458 F. 2d 819, 822; United States v. Brown (C.A.D.C. 1972), 463 F. 2d 949, 950-951; United States v. Thomas (C.A.D.C. 1976), 551 F. 2d 347, 348; United States v. White (C.A.D.C. 1981), 655 F. 2d 1302, 1304. We find that these two factors, standing alone, did not furnish probable cause to believe that Miller was engaged in criminal activity.

It has been suggested, however, that even if probable cause did not exist, the officers' conduct was justified under the intermediate "stop and frisk" standard. In Terry v. Ohio (1968), 392

U.S. 1, 27, the United States Supreme Court recognized that:

> "***there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.***And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." [Citations and footnote omitted.]

The search approved in that opinion "consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as

instruments of assault." Sibron, supra, at 65.

The Supreme Court has made it quite clear that the justification for this type of intrusion must also be personalized.

> "***.
>
> "Notwithstanding the absence of probable cause to search Ybarra, the State argues that the action of the police in searching him and seizing what was found in his pocket was nonetheless constitutionally permissible. We are asked to find that the first patdown search of Ybarra constituted a reasonable frisk for weapons under the doctrine of Terry v. Ohio ***.
>
> "We are unable to make even the first step required by this argument. The initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a patdown of a person for weapons.***."

Ybarra, supra, at 92-93 [footnote omitted].

As previously stated, there was no evidence allowing a reasonable suspicion that Miller was either engaged in criminal conduct or armed and dangerous. It is significant that the police substantially outnumbered the two men and no bystanders were initially present. Consequently, pat-down search was unwarranted.

Also significant is the concept that the scope of a Terry search "must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby". Terry, supra, at 26; see, also, State v. Bob (1988), 37 Ohio St. 3d 177, 180; State v. Andrews (1991), 57 Ohio St. 3d 86,89. The Court has noted that:

> "***.
>
> "We must still consider, however, the nature and quality of the intrusion on

> individual rights which must be accepted if police officers are to be conceded the right to search for weapons in situations where probable cause to arrest for crime is lacking. Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humilitating experience.***."

Terry, supra, at 24-25.

Under these facts, forcing Miller to lie prone on the ground and then to roll over did not constitute a permissible stop and frisk. Detective Miksch explained at the hearing that this practice was necessary to "control" Miller. However, Miller had shown no propensity to flee or resist the pat-down and was, in any event, outmanned by the numerous armed officers present. Quite simply, no exigent circumstances were presented which would have justified anything more than the quick

frisk for weapons sanctioned by Terry and its progeny.

In Bobo, supra, Andrews, supra, and State v. Williams (1990), 51 Ohio St. 3d 58, the Supreme Court of Ohio examined the intermediate stop and frisk standard. All three scenarios involved far more obvious signs of wrongdoings than that presented in the instant appeal. Bobo, supra, at 179 (suspect attempting to hide object under seat of car while parked at night in known drug-trafficking area); Williams, supra, at 61-62 (suspect, clothed in hunting attire, found at deserted house near marijuana field without credible reason for being there); Andrews, supra, at 88 (suspect seen running from police cruiser and tossing away object in high-crime neighborhood at night). In each case, the court found a brief frisk of the suspect to be constitutionally

permissible under Terry. However, none of these opinions suggest that anything more -- including a demand that the suspect lie prone on the ground -- would be acceptable under the circumstances.

In light of the routine and unremarkable nature of the officers' confrontation with Miller, their actions were excessive. See Dunaway v. New York (1979), 442 U.S. 200, 207-216. It is undisputed that the small pipe was discovered only as a result of Miller rolling on the ground in compliance with the detective's order. Therefore, this evidence should have been suppressed as the product of an illegal search and seizure. Terry, supra, at 28-29.

Conclusion

Miller's sole assignment of error is therefore sustained. Pursuant to App. R. 12(B), the motion to suppress is granted and Miller's plea of no-contest

is vacated. This case is remanded for further proceedings.

-

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellee.

Exceptions.

WILLIAM R. BAIRD
PRESIDING JUDGE FOR THE COURT

BAIRD, P.J.
CACIOPPO, J.
CONCUR

REECE, J.
DISSENTS SAYING:

I agree that the trial court erred in basing its decision on probable cause to arrest grounds. This case centers on the right of the police officers to conduct a pat-down of Miller for weapons while making an arrest, with clear probable cause, of Simmons. I disagree with the majority's conclusion.

I fear this decision follows too many others by courts that engage in legal, intellectual exercises under the guise of lofty constitutional pronouncements but ignore the realities and facts of the situation.

Once again, I emphasize that the Fourth Amendment of the United States

Constitution, as well as Article I, Section 14 of the Ohio Constitution, prohibit unreasonable searches or seizures. The reasonableness of the actions of the police in this case, in checking for weapons, is borne out both by the facts and myriad case law.

In the real world today, our cities are collapsing around us, the criminal element, emboldened by the greed and need in drugs, has virtually taken over some of our streets and neighborhoods, including the one herein. Random drive-by shootings and senseless killings, both of civilians and policemen, over drug deals are commonplace.

We sit in our secure courtrooms and split hairs while split-second, life or death decisions are being made on the battlegrounds of our streets by the police.

I do not believe that it is an abdication of our constitutional rights or responsibilities, in this day and age of almost every type of assault and automatic weapons, or unpredictable drug users and traffickers, to permit the police to protect themselves and the public at large by pat-down search for weapons of both Simmons and Miller.

An arrest, especially a drug arrest, in the nighttime, in a drug-plagued location, of an observed drug trafficker, does not occur in a polite, emotion-free, peaceful, antiseptic manner. It is an unpleasant and dangerous business at best.

The testimony is clear that the police intended to let Miller go on his way if no weapons were found on him. They did not intend to arrest him until such time as his drug pipe became obvious to them. To ignore the evidence

of a crime at that point would not be fulfilling their duty.

If the problem is the fact that Miller was ordered to lie on the ground and then to roll over in order to effect his pat-down, numerous courts have seen one difference between this procedure and similar ones, and the classic spread eagle and arms raised positions. Terry v. Ohio (1968), 392 U.S. 1; United States v. Berryhill (C.A. 9, 1971), 445 F. 2d 1189, 1193; United States v. Poms (C.A. 4, 1973), 484 F. 2d 919, 922; United States v. Simmons (C.A. 7, 1977), 567 F. 2d 314, United States v. Jacobs (C.A. 9, 1983), 715 F. 2d 1343, 1345-1346; United States v. Taylor (C.A. 9, 1983), 716 F. 2d 701 709; United States v. Buffington (C.A. 9, 1987), 815 F. 2d 1292, 1300-1301; United States v. Laing (C.A.D.C. 1989), 889 F. 2d 281, 285-286, certiorari denied (1990), 108 L. Ed. 2d

792; State v. Farmer (1984), 21 Ohio App. 3d 77, 486 N.E. 2d 238; State v. Moncrief (1980), 69 Ohio App. 2d 51, 431 N.E. 2d 336. Due deference must be afforded to the decisions of "those versed in the field of law enforcement." United States v. Cortez (1981), 449 U.S. 411, 418; "A 'reasonable reaction' in this context ***turns on 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" United States v. White (C.A.D.C. 1981), 648 F. 2d 29, 40, quoting Brinegar v. United States (1949), 338 U.S. 160, 175 [emphasis added].

If it is truly "unreasonable" for an experienced police officer making a legitimate arrest of a drug trafficker, at night, in a high crime area, to control and frisk and individual associating with the suspect before

sending him on his way, then we should hope that Blue Coats, Inc. is well funded.

I would affirm the judgment below.

APPEARANCES:

RENEE W. GREEN, Asst. Prosecutor, City-County Safety Bldg., Akron, Ohio 44308 for Plaintiff.

MARTA J. WILLIGER, Attorney at Law, 2095 East Ave., Akron, Ohio 44314 for Defendant.

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

THE STATE OF OHIO	)	No. CR 90-10-1901
	)	
Plaintiff	)	JUDGE SPICER
	)	
vs.	)	
	)	
DAVID SAMUEL MILLER	)	D E C I S I O N
	)	
Defendant		

This matter came before the Court on Defendant's Motion to Suppress evidence obtained during a pat search. Detective Thomas M. Miksch testified on behalf of the State. Defendant presented no testimony.

Based on a warrant they held for the arrest of Leo Simmons, officers were in the area of Wildwood and Bye Avenues. They spotted Simmons at the corner, talking to another man who is the Defendant in the present case. The officers approached the pair and ordered them down on the ground in order to

search them for weapons. No weapons were found on either man. In the process of the search a "straight-shooter" came out of Miller's pocket and landed on the ground next to him (A straight-shooter is a glass cylinder commonly used to smoke crack cocaine). Detective Miksch took the pipe into his possession and placed Miller under arrest for possession for criminal tools. Searches such as the one performed on Miller are routine in situations similar to that which the officers faced in this case. They were in a known drug area in search of Simmons, pursuant to a warrant for his arrest.

Defendant argues that there was no justification for the intrusive search carried out upon his person. However, the Court determines that the officers had probable cause to search Miller,

given the facts presented. Further, the Court determines that the crack pipe was obtained in a proper manner.

Therefore, Defendant's motion is denied.

It is so ordered.

JUDGE MARY F. SPICER

CC: Asst. Pros. Michael T. Callahan
Attorney Marta J. Williger
Criminal Assignment Office

ctm

Section 2925.11 [Drug abuse.]

(A) No person shall knowingly obtain, possess, or use a controlled substance.

(B) This section does not apply to manufacturers, practitioners, pharmacists, owners of pharmacies, and other persons whose conduct was in accordance with chapters 3719., 4715., 4729., and 4731.and 4741. of the Revised Code. This section does not apply to any person who obtained the controlled substance pursuant to a prescription issued by a practitioner, where the drug is in the original container in which it was dispensed to such person.

(C) Whoever violates this section is guilty of drug abuse:

(1) If the drug involved is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, drug abuse is a felony of the fourth degree, and if the offender has previously been convicted of a drug abuse offense, drug abuse is a felony of the third degree.

(2) If the drug involved is a compound, mixture, preparation, or substance included in schedule III, IV, or V, drug abuse is a misdemeanor of the third degree, and if the offender has previously been convicted of a drug abuse offense, drug abuse is a misdemeanor of the second degree.

(3) If the drug involved is marihuana, drug abuse is a misdemeanor of the fourth degree, unless the amount of marihuana involved is less than one hundred grams, the amount of marihuana resin, or extraction or preparation of such resin, is less than five grams, and

the amount of such resin in a liquid concentrate, liquid extract, or liquid distillate form, is less than one gram, in which case drug abuse is a minor misdemeanor.

(D) Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness.

* * *

Section 2923.24 [Possessing criminal tools.]

(A) No person shall possess or have under his control any substance, device, instrument, or article, with purpose to use it criminally.

(B) Each of the following constitutes prima-facie evidence of criminal purpose:

(1) Possession or control of any dangerous ordnance, or the materials or parts for making dangerous ordnance, in the absence of circumstances indicating such dangerous ordnance, materials, or parts are intended for legitimate use;

(2) Possession or control of any substance, device, instrument, or article designed or specially adapted for criminal use;

(3) Possession or control of any substance, device, instrument, or article commonly used for criminal purposes, under circumstances indicating such item is intended for criminal use.

(C) Whoever violates this section is guilty of possessing criminal tools, a felony of the fourth degree.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

(2)

Supreme Court, U.S.
FILED
MAR 26 1992
OFFICE OF THE CLERK

CASE NO. 91-1289

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

STATE OF OHIO,

Petitioner,

-vs-

DAVID S. MILLER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. DEAN CARRO
Counsel for Respondent Miller

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325-2901
(216) 972-7854

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Does a person's innocent association with an alleged drug trafficker give the police the constitutional authority to stop and then subject that person to a search by forcing him to lie prone on the ground and roll over?

PARTIES

The parties to this case are the STATE OF OHIO, represented by Mr. Phillip Bogdanoff, 53 University Avenue, Akron, Ohio 44308; and DAVID S. MILLER, represented by Mr. J. Dean Carro, Appellate Review Office, School of Law, The University of Akron, Akron, Ohio 44325-2901.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties	ii
Table of Authorities	iv
Statement of the Case	2
Summary of the Argument	3
Reason for Denying the Writ	4
Conclusion	18

TABLE OF AUTHORITIES

Page

Cases

Adams v. Williams, 407 U.S. 143 (1972) 9

Brower v. Inyo County, 489 U.S. 593 (1989) 10

Brown v. Texas, 443 U.S. 47 (1979) 13,14

California v. Hodari D., 499 U.S. ___, 111 S. Ct. 1547 (1991) 10

Carmara v. Municipal Court, 387 U.S. 523 (1967) 16

Delaware v. Prouse, 440 U.S. 648 (1979) 16

Florida v. Bostick, 499 U.S. ___, 111 S. Ct. 2383 (1991) 10,11,16

Florida v. Royer, 460 U.S. 491 (1983) 9

Michigan v. Chesternut, 486 U.S. 567 (1988) 10

Michigan v. Sitz, ___ U.S. ___, 110 S. Ct. 2481 (1990) 5

Sibron v. State of New York, 392 U.S. 1 (1968) 6,7,8

State v. Miller, C.A. No. 14973, Ninth Judicial District, unreported (July 31, 1991) 2,7

Terry v. Ohio, 392 U.S. 1 (1968) 8,9,10,15

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 9

United States v. Causey, 834 F.2d 1179, 1184 (5th Cir. 1987) 14

United States v. Cortez, 449 U.S. 411 (1981) 12

United States v. Montoya de Hernandez, 473 U.S. 531 (1985) 12,16

United States v. Thorpe, 536 F.2d 1098 (5th Cir. 1976) 14

Page

United States v. Villamonte-Marquez, 462 U.S. 579 (1983) 16

Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560 (1972) 12,13

Ybarra v. Illinois, 444 U.S. 85 (1979) 9

CASE NO. 91-1289

==========

IN THE
SUPREME COURT OF THE UNITED STATES

==========

October Term, 1991

STATE OF OHIO,

Petitioner,

-vs-

DAVID S. MILLER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

David S. Miller, Respondent here, prays that this Court will deny the petition for a writ of certiorari as the position set forth by the State of Ohio lacks constitutional support.

STATEMENT OF THE CASE

The appellate court found that Mr. Miller's innocent association with a drug-trafficking suspect did not establish probable cause to arrest [**State v. Miller**, C.A. No. 14973, Ninth Judicial District at 4, unreported (July 31, 1991) (Appendix, hereafter App., at A-4)]. Nor did it believe Mr. Miller was engaged in criminal activity (**Id.**). The Court of Appeals also found the pat-down search to be unwarranted since the police, including members of the SWAT Team, greatly outnumbered Mr. Miller and they did not suspect Mr. Miller to be either armed or dangerous (Transcript, hereafter Tr., at 12). The Court of Appeals found that forcing Mr. Miller "to lie prone on the ground and then to roll over did not constitute a permissible stop and frisk." (**State v. Miller** at 7; App. at A-7). No exigent circumstances were presented which would have justified the actions of the police and the SWAT Team (**Ibid.**).

SUMMARY OF THE ARGUMENT

This case presents no viable constitutional issue to be reviewed by this Court. A person's innocent association with an individual suspected of drug trafficking has never been sufficient to support a stop of that person. In order to justify even the least intrusive stop of a citizen, the police must have personal knowledge of suspected criminal activity or have information from a reliable source, which reasonably indicates criminal activity or that the person stopped is armed or dangerous. Absent these circumstances, the police violate a person's Fourth Amendment right to be free from unreasonable searches and seizures when they order that person to lie prone on the ground and roll over.

REASON FOR DENYING THE WRIT

IN THE ABSENCE OF AN ARTICULABLE SUSPICION OF INDIVIDUAL CRIMINAL ACTIVITY, THE POLICE MAY NOT, CONSISTENT WITH THE FOURTH AMENDMENT, STOP AND SEIZE A CITIZEN MERELY BECAUSE THAT CITIZEN IS IN THE COMPANY OF A PERSON WANTED BY THE POLICE.

The United States Constitution is fragile. This Court has carefully interpreted the Constitution to insure that the principles embodied within the Constitution do not lose their significance. Before this Court, the State of Ohio seeks to upset the delicate balance between individual rights and society's need to combat criminal activity.

Under the guise of the war on drugs, the State proposes that police officers are entitled to stop persons who are in the company of drug trafficking suspects, without any suspicion that the individual stopped is about to, or has committed, a crime. Indeed, the State proposes that even though no suspicious behavior has been observed by the police officers, a person may be stopped, searched, and seized, based on mere association with a drug trafficking suspect. Furthermore, the State insists that if a citizen engages in a conversation with a criminal suspect on a public street, the police are entitled to stop and frisk the citizen. In essence, the State proposes that the Fourth Amendment has become a casualty of the war on drugs.

This proposition is unacceptable. The Bible says "Where there is no vision, the people perish: but he that keepeth the law, happy is he." (Proverbs 29:18) The United States Constitution and the Bill of Rights cry out against the State's

propositions. The Fourth Amendment to the Constitution guarantees the right of a person "to be secure in his or her person . . . against unreasonable searches and seizures." Absent suspicion of criminal activity, the Fourth Amendment protects the right of individuals to engage freely in a conversation with any person on a public street without the State intruding to stop, search, and seize the individual or the individual's possessions.[1]

In this case, the police had no suspicion that Mr. Miller was engaged in criminal activity. Rather, the basis for the stop, seizure, and search was that Mr. Miller was seen talking to a suspected drug trafficker. On this basis, the police stopped Mr. Miller, ordered him to lie prone on the ground, searched him, and ordered him to roll over. Under these circumstances, the

---

1 In the 200 years that this Court has been interpreting the Fourth Amendment, this proposition, almost without exception, has been true. What appears to be the one exception to this proposition most recently appeared in **Michigan** v. **Sitz**, ___ U.S. ___, 110 S. Ct. 2481 (1990).

The **Sitz** Court recognized that a citizen was "seized" when stopped at a highway checkpoint. The issue in the case was whether the seizure was reasonable. In finding the brief seizure reasonable, the Court balanced the State's great interest in combating drunken driving versus the limited intrusiveness of a momentary highway checkpoint stop. **Sitz**, ___ U.S. ___, 110 S. Ct. at 2486. This Court felt that the balance weighed in favor of the State. The level of intrusion in **Sitz** was both subjectively and objectively low. The checkpoints were set up during the day, the drivers were aware of the stop well before their actual progress was impeded, and the police contact was minimal. **Sitz**, ___ U.S. ___, 110 S. Ct. at 2487. In the case at bar, Mr. Miller was standing on a public street when he was stopped. He was told to lie on the ground. Certainly the level of intrusion here was far greater than that in **Sitz**, thereby distinguishing this case from **Sitz**.

level of police intrusion went far beyond what a private individual standing on a public street would reasonably expect. One may expect to be queried by the police, but one does not expect to be held at gunpoint and forced to lie face down in the street in the absence of any suspicion of criminal activity.

Contrary to the State's argument, this Court has long held that mere association with a person suspected of criminal activity will not justify a seizure. In Sibron v. State of New York, 392 U.S. 1 (1968), a police officer observed the defendant engaged in conversation with known narcotics addicts for a period greater than eight hours. The officer neither heard any part of the conversation nor saw anything pass between the defendant or any of the others. The officer did not suggest on the witness stand that he was "in fear of bodily harm" or that he searched the defendant "in self-protection to find weapons." Sibron at 46. This Court stated:

> The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security . . . It is axiomatic that an incident search may not precede an arrest and serve as part of its justification (citations omitted). Thus the search cannot be justified as incident to a lawful arrest.

Sibron at 62-63.

Even though probable cause was lacking in Sibron, this Court was willing to find the search and seizure justifiable, if the officer had reasonable grounds to believe the defendant was

armed and dangerous. **Sibron** at 63. In the case at bar, the police were not confused as to which person they were supposed to search and detain (Tr. at 11). When the police arrived on the scene, they observed the suspect, Mr. Simmons, and Mr. Miller talking (Tr. at 6). Detective Miksch admitted that he had no evidence to support a reasonable suspicion that Mr. Miller was either engaged in criminal conduct, was armed, or dangerous (Tr. at 10). He did not hear any portion of the conversation between Mr. Miller and the alleged narcotics suspect. As the state Court of Appeals noted "it is significant that the police substantially out numbered the two men and no bystanders were initially present." (State v. Miller at 6; App. at A-6) Thus, the State's contention that mere association is enough to subject one to a stop is a radical departure from this Court's long-standing interpretation of the Fourth Amendment.

Likewise, this Court has historically held a firm rein on what constitutes a seizure. Starting with **Sibron**, this Court has emphasized that a police officer is not empowered to seize and search every person the officer sees on the street or of whom inquiry is made.

> Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so. In the case of the self-protective search for weapons, he must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.

Sibron at 64.

The original sire of this doctrine is found in the companion case to **Sibron**. The stop and frisk procedures outlined in **Terry v. Ohio**, 392 U.S. 1 (1968), limit the police to stopping citizens when the police directly observe unusual conduct which would lead the officer to reasonably conclude, based upon his experience, that the person is engaged in criminal conduct or armed and dangerous. In order for the stop and frisk to be valid under **Terry**, the officer must (1) identify himself as a law enforcement officer, (2) make reasonable inquiries, and (3) nothing in the initial stages of the encounter must serve to dispel his reasonable fear for his own or others' safety. The search must be confined to the outer clothing in an attempt to discover weapons which might be used to cause bodily injury or harm to the officer. In **Terry**, this Court emphatically stated:

> Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred.

Terry v. Ohio, 392 U.S. at 19, n.16.

In this case, the basic requirements of a **Terry** stop were not met since Officer Miksch testified that he did not receive any information from the undercover team about the defendant, Mr. Miller (Tr. at 10). Furthermore, he did not directly observe Mr. Miller do anything which would arouse his suspicion that Mr. Miller was engaged in criminal conduct, was armed, or dangerous (Tr. at 10). The stop of Mr. Miller was based upon nothing more

than Mr. Miller's association with an alleged suspect of drug trafficking. This Court has directly held that stops may not be made on mere association with a drug trafficking suspect alone, but in this instance that is precisely what happened.[2]

Are the police to be allowed to make up their own rules and then attempt to justify them on theories already declared unconstitutional by this Court?

The stop of Mr. Miller may not be justified after the fact. A **Terry** stop must "last no longer than is necessary to effectuate the purpose of the stop" and "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." **United States v. Brignoni-Ponce**, 422 U.S. 873, 881-882 (1975); **see also Adams v. Williams**, 407 U.S. 143, 146 (1972). This Court has consistently stood by this standard.

In **Florida v. Royer**, 460 U.S. 491 (1983), airport detectives stopped and queried a suspected drug courier. The detectives then identified themselves as narcotics investigators and informed the suspect they had reason to believe that he was transporting narcotics. Without returning his airline ticket or driver's license, the detectives escorted the suspect, against

---

2 For example, in **Ybarra v. Illinois**, 444 U.S. 85 (1979), the state argued that it could search individuals on the premises, which premises was the subject of a search warrant. This Court rejected this argument. The requirement of probable cause to support a seizure "cannot be irrelevant or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be." **Ybarra** at 91.

his will, to a small room adjacent to the concourse, where he was held for approximately 15 minutes while the detectives searched his luggage. Although the suspect consented to the initial stop and search, this Court found that the involuntary detention exceeded the limited restraint permitted by **Terry** and thus escalated into an illegal arrest.

A valid **Terry** stop may be converted into an illegal arrest. In **Michigan v. Chesternut**, 486 U.S. 567 (1988), the Court defined when a person is "seized." The decisive test is whether, given the totality of circumstances surrounding the encounter, the police conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." **Chesternut** at 569. This rule was most recently reiterated in **California v. Hodari D.**, 499 U.S. ___, ___, 111 S. Ct. 1547, 1551 (1991), when this Court held that a "seizure" does not occur simply because an officer approaches an individual and asks a few questions, so long as a reasonable person would feel free to disregard the police and go about his business. "The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature." Florida v. Bostick, 499 U.S. ___, 111 S. Ct. 2383, 2386 (1991).

Assuming, arguendo, that the stop of Mr. Miller was a valid **Terry** stop, it became an illegal arrest when the police officers and a SWAT Team pounced upon Mr. Miller, constituting a "show of authority". **See, e.g., Brower v. Inyo County**, 489 U.S. 593, 596 (1989). Under these circumstances, Mr. Miller could not reasonably believe that he was free to leave. He did not consent

to the stop and the subsequent search. He had no choice. The police did not advise him that he had a right to refuse the search or to leave the area.

> "Consent" that is the product of official intimidation or harassment is not consent at all. Citizens do not forfeit their constitutional rights when they are coerced to comply with a request that they would prefer to refuse.

Florida v. Bostick, ___ U.S. at ___, 111 S. Ct. at 2388.

Considering the totality of circumstances, Mr. Miller did not consent. He was ordered to the ground and ordered to lie face down. The police surrounded him and barked commands to comply with their orders. Faced with such intimidation, he complied immediately. It is not surprising that Mr. Miller complied under these circumstances. It is extraordinary, though, that the State now proposes to not only condone this kind of unreasonable behavior, but has the audacity to ask the Court to become a party to it. This is not the type of police action which is to be lauded and applauded; rather, it is to be condemned!

The consequences of allowing the State to detain and restrain private citizens without any suspicion of criminal activity are reminiscent of the days of witch-hunts. If the police were given unbridled authority to stop any person on a public street, just because they were engaged in conversation with another, the courts would become even more crowded then they now are. The public's sense of protection from unwarranted

governmental intrusion would be destroyed. This case is a prime example of that prophecy. Mr. Miller, a man who exhibited no furtive or criminal behavior, was reduced to lying prone on the ground and subjected to a warrantless and unjustified search. There is a line which the police absolutely may not cross. The line has been drawn by this Court. In **United States v. Cortez**, 449 U.S. 411, 417-419 (1981), this Court declared that a stop must be based upon a "particularized and objective basis for suspecting the particular person stopped of criminal activity." A stop must be based upon more than an "inchoate and unparticularized suspicion or 'hunch.'" **United States v. Montoya de Hernandez**, 473 U.S. 531, 542 (1985).

Inherent in this proposition is the idea that a citizen's Fourth Amendment right to be free from unreasonable searches and seizures is an individual right. Each person, when confronted by the police, may choose to exercise that right absent an officer's particularized and objective suspicion of criminal activity. Mr. Miller should have been able to make that choice and exercise that right. His opportunity to execute his rights was denied.

This Court has consistently rejected the argument that:

> a reviewing court should employ less stringent standards for reviewing a police officer's assessment of probable cause as a prelude to a warrantless arrest than the court would employ reviewing a magistrate's assessment as a prelude to issuing an arrest or search warrant.

Whiteley v. Warden, Wyoming State Penitentiary, 401 U.S. 560, 566 (1972).

Historically, reviewing courts have required an officer to have either a warrant or specific facts which would justify stopping a person. To that end this Court has maintained that:

> the standards applicable to the factual basis supporting the officer's probable-cause assessment at the time of the challenged arrest and search are at least as stringent as the standards applied with respect to the magistrate's assessment.

Ibid.

In **Brown v. Texas**, 443 U.S. 47 (1979), two officers observed one man walking away from another in an alley located in a high drug trafficking area. One of the men was stopped. One officer testified that the man was stopped because "the situation 'looked suspicious'" and the man was unknown to either officer. **Brown** at 49. This Court emphasized that under the Fourth Amendment:

> a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.

Brown v. Texas, 443 U.S. at 51.

None of the facts in this case justify any reasonable suspicion that criminal activity was afoot. The only observations made by the officers were that two men were talking to each other on a public street. Absent other evidence, it cannot reasonably be inferred that a conversation between two men on a

public street constitutes criminal activity. Detective Miksch admitted that Mr. Miller was unknown to him (Tr. at 7). Detective Miksch admitted that he had not received any information from other officers about Mr. Miller. (Tr. at 7) Indeed, his personal observations indicated only that the two men were talking (Tr. at 6). At the onset of these circumstances there were no bystanders (Tr. at 11). The officers observed no suspicious activity (Tr. at 3). The information radioed to the officers and the SWAT Team did not indicate that Mr. Miller was to be detained, was armed, or dangerous. In fact, the radio message contained no mention of Mr. Miller (Tr. at 6). Detective Miksch indicated that he "wasn't aware of any charges for Mr. Miller at that time," nor did he observe any suspicious behavior (Tr. at 7). Detective Miksch did not observe weapons on Mr. Miller (Tr. at 10).

Although the State does not cite to the case,[3] in Brown, under analogous circumstances this Court unanimously held:

> In the absence of any basis for suspecting . . . misconduct, the balance between the public interest and [a person's] right to personal security and privacy tilts in favor of freedom from police interference . . . When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.

Brown v. Texas, supra, 443 U.S. at 52.

---

3 More significantly, the State relied on **United States v. Thorpe**, 536 F.2d 1098 (5th Cir. 1976), in its Petition for Writ of Certiorari to this Court. **Thorpe** was expressly overruled in **United States v. Causey**, 834 F.2d 1179, 1184 (5th Cir. 1987).

A. An unreasonable protective search is presumptively invalid.

A protective search for weapons is permitted under **Terry v. Ohio**. Required elements to validate a protective search are (1) evaluation of the scope of the search, the reasonableness of the forcible stop and (2) whether the persons with whom the officers are dealing may be presently armed and dangerous. **Terry** at 30. In evaluating the latter requirement, the search must be "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." **Terry** at 29.

Neither element is present in this case. The scope of the search far exceeded any expectation of reasonableness. Detective Miksch testified that Mr. Miller was requested to lie on the ground in order "control him (Tr. at 11-12) Where was Mr. Miller going to go when he was surrounded by so many police officers, even Detective Miksch did not remember the exact number (Tr. at 11). Under these circumstances any reasonable person would not attempt to run. Detective Miksch agreed that Mr. Miller did not run (Tr. at 13). Mr. Miller's compliance was immediate (Tr. at 7). Although retrospective, one could argue that under these circumstances a stand up pat-down for weapons would have been reasonable. The officers went far beyond that.

The resulting searcn produced no guns, knives, clubs, or other hidden instruments. In fact, no weapons of any kind were found. When Mr. Miller rolled over in compliance with the officer's orders, a two-inch pipe fell out of his pocket, resulting in Mr. Miller's formal arrest (Tr. at 8).

Whether a law enforcement practice is permissible is judged by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." **United States v. Montoya de Hernandez**, 473 U.S. 531, 537 (1985). See also **United States v. Villamonte-Marquez**, 462 U.S. 579, 588 (1983); **Delaware v. Prouse**, 440 U.S. 648, 654 (1979); **Carmara v. Municipal Court**, 387 U.S. 523, 534-35 (1967).

This stop was impermissible. The government interests in this setting were not legitimate and did not outweigh the right of Mr. Miller to be secure from unreasonable searches and seizures. The State of Ohio declares the authority of the police to stop and search companions of a person suspected of drug trafficking. This interest has not been legitimized by this Court. In **Florida v. Bostick**, ___ U.S. ___, 111 S. Ct. 2382, 2389 (1991), this Court held:

> This Court . . . is not empowered to suspend constitutional guarantees so that the Government may more effectively wage a "war on drugs." (citations omitted) If that war is to be fought, those who fight it must respect the rights of individuals, whether or not those individuals are suspected of having committed a crime.

The right to be free from unreasonable searches and seizures is an individual right. A warrantless stop and search made without reasonable or individualized suspicion of criminal activity, but resting solely on mere association or conversation with a drug-trafficking suspect, is constitutionally unsupportable.

This Court has consistently rejected arguments which would further erode the Fourth Amendment and give police a right to subject citizens to a stop and search based on mere association without any suspicion of criminal conduct. The right to be free from unreasonable searches and seizures is an individual right.

CONCLUSION

Respondent David S. Miller prays that this Court will deny the Petition for Writ of Certiorari.

Respectfully submitted,

J. DEAN CARRO
Counsel for David S. Miller

Appellate Review Office
School of Law
The University of Akron
Akron, Ohio 44325-2901
(216) 972-7751

STATE OF OHIO)		IN THE COURT OF APPEALS
)	ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT)		

STATE OF OHIO	)	C.A. NO. 14973
	)	
Plaintiff-Appellee	)	
	)	
v.	)	APPEAL FROM JUDGMENT
	)	ENTERED IN THE
DAVID S. MILLER	)	COMMON PLEAS COURT
	)	COUNTY OF SUMMIT, OHIO
Defendant-Appellant	)	CASE NO. CR 90 10 1901

DECISION AND JOURNAL ENTRY

Dated: July 31, 1991

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

Per Curiam. Defendant-appellant, David Samuel Miller, appeals a ruling of the Summit County Court of Common Pleas finding that a search of his person prior to his arrest satisfied the requirements of the Fourth Amendment to the United States Constitution.

Facts

The events leading to Miller's indictment for possessing criminal tools, R.C. 2923.24, and drug abuse, R.C. 2925.11, are not disputed. During the evening of October 6, 1990, the Akron Police Department conducted a drug sweep in response to complaints from residents in the vicinity of Wildwood Avenue. An undisclosed number of narcotics

officers and SWAT team members participated in the endeavor. Detective Thomas Michael Miksch, who had sixteen years experience in narcotics investigations, received a radio dispatch instructing him to arrest Leo Simmons for aggravated trafficking in cocaine. In order to preserve the secrecy of the operation, the detective did not approach Simmons until he had left the area where undercover officers were attempting to make drug-buys. Detective Miksch later observed Simmons at a street corner known for narcotics sales. Simmons was engaged in a conversation with Miller. No one else was present in the vicinity.

Accompanied by several officers, Detective Miksch confronted Simmons and Miller and ordered them to lie on the ground. He conducted a pat-down search of Miller and instructed him to roll over. A two-inch glass cylinder fell out of Miller's pocket as he complied. Recognizing the object as a tool for smoking cocaine, the detective seized it and placed Miller under arrest. The pipe was later found to contain cocaine residue.

Miller filed a pre-trial motion in the common pleas court seeking suppression of the pipe as the fruit of an illegal search. At an evidentiary hearing on the matter, Miksch testified that he had observed no suspicious actions by Miller, and in response to a question concerning whether there was any indication that Miller might have had weapons on him, Miksch stated that he had no way of knowing until he patted him down.

Without making any factual findings as to there being either a reasonably articulable suspicion as to Miller's commission of a crime, or reasonable belief that he was armed, the trial court overruled the motion. Miller pleaded no contest to the charge of drug abuse and this appeal follows.

Assignment of Error

> "The defendant-appellant, David Samuel Miller, for his assignment of error, says that the decision rendered by the Court of Common Pleas, Summit County, Ohio, on January 2, 1991, is erroneous in overruling defendant's motion to suppress illegally obtained evidence."

There can be little doubt that when the officers approached Simmons and Miller and ordered them to lie on the ground, a "seizure" was effected for Fourth Amendment purposes. United States v. Mendenhall (1980), 446 U.S. 544, 552-555. Once Miller moved to suppress the evidence obtained, the prosecution bore the burden of establishing the constitutional propriety of the warrantless search. Xenia v. Wallace (1988), 37 Ohio St. 3d 216, paragraph two of the syllabus.

The trial court determined that probable cause existed to believe Miller was engaged in criminal activity as he stood on the street corner talking with Simmons. Under such circumstances an immediate, warrantless search of his person would be constitutionally justified as contemporaneous with a lawful arrest. United States v. Robinson (1973), 414 U.S. 218, 235; State v. Moon (May 15, 1991), Lorain App. No.

90CA004882, unreported, at 4-5. Given that the facts presented are not in question, we review this legal conclusion de novo. See United States v. Maybusher (C.A. 9, 1984), 735 F. 2d 366, 371 fn. 1, certiorari denied (1985), 469 U.S. 110.

Probable cause to arrest and search an individual exists when the facts available to the officers at that moment warrant a person of reasonable caution in the belief that an offense has been committed. Beck v. Ohio (1964), 379 U.S. 89, 96. When the police initially encountered Miller, he was simply talking with Simmons in a high-crime neighborhood. Detective Miksch testified at the hearing that he did not know the subject matter of the conversation and no weapons, drugs, or suspicious actions were observed.

Miller's mere association with Simmons, albeit he was a drug-trafficking suspect, did not establish probable cause to arrest. As the United States Supreme Court stated in Sibron v. New York (1968), 392 U.S. 40, 62:

> "***The inference that persons who talk to narcotics addicts are engaged in the criminal traffic in narcotics is simply not the sort of reasonable inference required to support an intrusion by the police upon an individual's personal security.***."

The Court further explained in Ybarra v. Illinois (1979), 444 U.S. 85, 91, that:

> "***Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another[.]"

See, also, State v. Fahy (1988), 49 Ohio App. 3d 160, 161-162.

In cases involving arrests in high-crime areas, courts employing the probable cause analysis generally require more concrete examples of furtive behavior than mere association with a criminal suspect. See, e.g., United States v. Davis (C.A.D.C. 1972), 458 F. 2d 819, 822; United States v. Brown (C.A.D.C. 1972), 463 F. 2d 949, 950-951; United States v. Thomas (C.A.D.C. 1976), 551 F. 2d 347, 348; United States v. White (C.A.D.C. 1981), 655 F. 2d 1302, 1304. We find that these two factors, standing alone, did not furnish probable cause to believe that Miller was engaged in criminal activity.

It has been suggested, however, that even if probable cause did not exist, the officers' conduct was justified under the intermediate "stop and frisk" standard. In Terry v. Ohio (1968), 392 U.S. 1, 27, the United States Supreme Court recognized that:

> "***there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.***And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." [Citations and footnote omitted.]

The search approved in that opinion "consisted solely of a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault." Sibron, supra, at 65.

The Supreme Court has made it quite clear that the justification for this type of intrusion must also be personalized.

"***.

> "Notwithstanding the absence of probable cause to search Ybarra, the State argues that the action of the police in searching him and seizing what was found in his pocket was nonetheless constitutionally permissible. We are asked to find that the first patdown search of Ybarra constituted a reasonable frisk for weapons under the doctrine of Terry v. Ohio ***.
>
> "We are unable to take even the first step required by this argument. The initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a patdown of a person for weapons.***."

Ybarra, supra, at 92-93 [footnote omitted].

As previously stated, there was no evidence allowing a reasonable suspicion that Miller was either engaged in criminal conduct or armed and dangerous. It is significant that the police substantially outnumbered the two men and no bystanders were initially present. Consequently, a pat-down search was unwarranted.

Also significant is the concept that the scope of a Terry search "must be limited to that which is necessary for the discovery of weapons which might be used to harm the

officer or others nearby". Terry, supra, at 26; see, also, State v. Bobo (1988), 37 Ohio St. 3d 177, 180; State v. Andrews (1991), 57 Ohio St. 3d 86, 89. The Court has noted that:

> "***.
>
> "We must still consider, however, the nature and quality of the intrusion on individual rights which must be accepted if police officers are to be conceded the right to search for weapons in situations where probable cause to arrest for crime is lacking. Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.***."

Terry, supra, at 24-25.

Under these facts, forcing Miller to lie prone on the ground and then to roll over did not constitute a permissible stop and frisk. Detective Miksch explained at the hearing that this practice was necessary to "control" Miller. However, Miller had shown no propensity to flee or resist the pat-down and was, in any event, outmanned by the numerous armed officers present. Quite simply, no exigent circumstances were presented which would have justified anything more than the quick frisk for weapons sanctioned by Terry and its progeny.

In Bobo, supra, Andrews, supra, and State v. Williams (1990), 51 Ohio St. 3d 58, the Supreme Court of Ohio examined the intermediate stop and frisk standard. All three scenarios involved far more obvious signs of wrongdoings than that presented in the instant appeal. Bobo,

supra, at 179 (suspect attempting to hide object under seat of car while parked at night in known drug-trafficking area); Williams, supra, at 61-62 (suspect, clothed in hunting attire, found at deserted house near marijuana field without credible reason for being there); Andrews, supra, at 88 (suspect seen running from police cruiser and tossing away object in high-crime neighborhood at night). In each case, the court found a brief frisk of the suspect to be constitutionally permissible under Terry. However, none of these opinions suggest that anything more -- including a demand that the suspect lie prone on the ground -- would be acceptable under the circumstances.

In light of the routine and unremarkable nature of the officers' confrontation with Miller, their actions were excessive. See Dunaway v. New York (1979), 442 U.S. 200, 207-216. It is undisputed that the small pipe was discovered only as a result of Miller rolling on the ground in compliance with the detective's order. Therefore, this evidence should have been suppressed as the product of an illegal search and seizure. Terry, supra, at 28-29.

Conclusion

Miller's sole assignment of error is therefore sustained. Pursuant to App. R. 12(B), the motion to suppress is granted and Miller's plea of no-contest is vacated. This case is remanded for further proceedings.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellee.

Exceptions.

William R Baird

WILLIAM R. BAIRD
PRESIDING JUDGE FOR THE COURT

BAIRD, P. J.
CACIOPPO, J.
CONCUR

REECE, J.
DISSENTS SAYING:

I agree that the trial court erred in basing its decision on probable cause to arrest grounds. This case centers on the right of the police officers to conduct a pat-down of Miller for weapons while making an arrest, with clear probable cause, of Simmons. I disagree with the majority's conclusion.

I fear this decision follows too many others by courts that engage in legal, intellectual exercises under the guise of lofty constitutional pronouncements but ignore the realities and facts of the situation.

Once again, I emphasize that the Fourth Amendment of the United States Constitution, as well as Article I, Section 14 of the Ohio Constitution, prohibit unreasonable searches or seizures. The reasonableness of the actions of the police in this case, in checking for weapons, is borne out both by the facts and myriad case law.

In the real world today, our cities are collapsing around us, the criminal element, emboldened by the greed and need in drugs, has virtually taken over some of our streets and neighborhoods, including the one herein. Random drive-by shootings and senseless killings, both of civilians and policemen, over drug deals are commonplace.

We sit in our secure courtrooms and split hairs while split-second, life or death decisions are being made on the battlegrounds of our streets by the police.

I do not believe that it is an abdication of our constitutional rights or responsibilities, in this day and age of almost every type of assault and automatic weapons, of unpredictable drug users and traffickers, to permit the police to protect themselves and the public at large by a pat-down search for weapons of both Simmons and Miller.

An arrest, especially a drug arrest, in the nighttime, in a drug-plagued location, of an observed drug trafficker,

does not occur in a polite, emotion-free, peaceful, antiseptic manner. It is an unpleasant and dangerous business at best.

The testimony is clear that the police intended to let Miller go on his way if no weapons were found on him. They did not intend to arrest him until such time as his drug pipe became obvious to them. To ignore the evidence of a crime at that point would not be fulfilling their duty.

If the problem is the fact that Miller was ordered to lie on the ground and then to roll over in order to effect his pat-down, numerous courts have seen no difference between this procedure and similar ones, and the classic spread eagle and arms raised positions. Terry v. Ohio (1968), 392 U.S. 1; United States v. Berryhill (C.A. 9, 1971), 445 F. 2d 1189, 1193; United States v. Poms (C.A. 4, 1973), 484 F. 2d 919, 922; United States v. Simmons (C.A. 7, 1977), 567 F. 2d 314, United States v. Jacobs (C.A. 9, 1983), 715 F. 2d 1343, 1345-1346; United States v. Taylor (C.A. 9, 1983), 716 F. 2d 701, 709; United States v. Buffington (C.A. 9, 1987), 815 F. 2d 1292, 1300-1301; United States v. Laing (C.A.D.C. 1989), 889 F. 2d 281, 285-286, certiorari denied (1990), 108 L. Ed. 2d 792; State v. Farmer (1984), 21 Ohio App. 3d 77, 486 N.E. 2d 238; State v. Moncrief (1980), 69 Ohio App. 2d 51, 431 N.E. 2d 336. Due deference must be afforded to the decisions of "those versed in the field of law enforcement." United States v. Cortez (1981), 449 U.S. 411, 418; "A 'reasonable reaction' in this

context***turns on 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" United States v. White (C.A.D.C. 1981), 648 F. 2d 29, 40, quoting Brinegar v. United States (1949), 338 U.S. 160, 175 [emphasis added].

If it is truly "unreasonable" for an experienced police officer making a legitimate arrest of a drug trafficker, at night, in a high crime area, to control and frisk an individual associating with the suspect before sending him on his way, then we should hope that Blue Coats, Inc. is well funded.

I would affirm the judgment below.

APPEARANCES:

RENEE W. GREEN, Asst. Prosecutor, City-County Safety Bldg., Akron, OH 44308 for Plaintiff.

MARTA J. WILLIGER, Attorney at Law, 2095 East Ave., Akron, OH 44314 for Defendant.